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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

FRITZ CONTZEN,
APPELLANT,

v.

THE UNITED STATES AND THE APACHE INDIANS.

No. 84.

Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANT.

I.

In our view, this case is not controlled by the law of individual naturalization, as accomplished by affirmative procedure on the part of an individual, under express statute. Collective naturalization—absorption *en masse* of the inhabitants of a community upon change of sovereignty, is in no way controlled or affected by the legislation of the new sovereign, which applies in individual cases and to emigrants coming from abroad. In respect

of collective naturalization, the reciprocal duty of allegiance to and protection from the new sovereign does not depend upon individual record declarations. The very instance cited upon opposing brief—the treaty of Guadalupe Hidalgo (9 Stats. 930), forcibly illustrates this contention.

By Article 8 thereof all Mexicans were permitted to make election, within one year, either to remain subjects of Mexico or to become citizens of the United States. Their election to become the latter, required no affirmative act, for the treaty expressly provided that—

"Those who shall remain in the said territory after the "expiration of that year, without having declared their "intention to retain the character of Mexicans, shall be "construed to have elected to become citizens of the "United States."

Silent acquiescence in the change of political sovereignty was all that was required, whereby thousands thus became citizens of the United States by this form of collective naturalization through this express treaty provision.

When, then, Texas was admitted to the Union in December, 1845, without express treaty or statutory provision in this regard, the same legal result necessarily attached. The Republic of Texas thereby ceased to exist. There was no retained sovereignty over any territory, and hence the people of the former Republic came into the Union as citizens thereof, excepting only those special classes who could not then become citizens, either of the Republic of Texas or the succeeding sovereign—the United States—such as slaves or Indians. Appellant was not of these excluded classes. He was then a resident of Texas.

Between the date of his arrival in that Republic (July, 1845), and the admission of Texas into the Union (Decem-

ber, 1845), he was a minor, and hence incapable of making a formal declaration of intention under the Texas law. This the opposing brief concedes, but he continued to reside in Texas until after he had attained his majority, giving thereby the most definite declaration of intention of permanent change of domicile.

On arrival at majority in 1854, he sought individual naturalization, and went into the Court for that purpose, and being there informed that because he was a resident of Texas in 1845, when the State was admitted into the Union, he became thereby a citizen of the United States, *he was allowed to vote.*

Opposing counsel insist that the findings do not authorize the presumption that he was so informed judicially on his application for individual naturalization, because, it is insisted, no judicial record of the transaction is presented. The obvious answer is that any record of such occurrence would naturally not be preserved. Any one familiar with the practical method of applying for admission to citizenship knows that such application is made orally at the bar, and after examination by the Judge is admitted or denied, according to the facts developed and the Court's ruling thereon. In event of denial there is no occasion for any record. That is made only where the application is allowed, and thereafter stands as a judicial record of the fact of such allowance. It would be unjust in the extreme to here rule that because the appellant does not produce the record of his non-naturalization, that hence the presumption should be indudged that the Court to whom he applied did not judicially act thereon. In fairness, the presumption should be all the other way.

II.

It is equally plain that by such collective naturalization, whether accomplished under treaty or statute, whereby the inhabitants of the ceded country are admitted to citizenship, there would be no affirmative acceptance on the part of the new sovereign. The adjudicated cases, and the law writers cited under this head by opposing counsel, deal only with cases of individual, and not collective naturalization. They are, hence, without proper application here.

It is in no sense an unwarrantable assumption to say that the appellant came to Texas and resided there with the intention of becoming a citizen of that Republic. The finding is that he continued to reside there "until he "came to Arizona in 1855, with Major Emory, on the "boundary commission." His continued acts abundantly declare his continuing and uniform intention. He was not a "tourist within its borders" or of excluded African or Indian blood. We still insist that the Laverty and Dubois (Louisiana) cases cited on our former brief are applicable here.

Nor is it correct to say that in *Boyd* v. *Thayer* (143 U. S. 135) the majority opinion rested only upon the assumption that the declaration or naturalization of the father of Boyd created citizenship in his son. Even on that point, the case was not ruled by four only of the Justices, as counsel erroneously assume, but by a majority of the Court. And all of the justices, with one exception, united in concurring with the conclusion adopted by the Court in its second line of reasoning, wherein (page 180), in speaking of individual naturalization, it was aptly observed:

"It is true that naturalization under the acts of Con-
" gress known as the naturalization laws can only be
" completed before a court, and that the usual proof of
" naturalization is a copy of the record of the court. But
" it is equally true that where no record of naturalization
" can be produced, evidence that a person, having the
" requisite qualifications to become a citizen, did in fact
" and for a long time vote and hold office and exercise
" rights belonging to citizens, is sufficient to warrant a
" jury in inferring that he had been duly naturalized as a
" citizen. *Blight* v. *Rochester*, 7 Wheat. 535, 546; *Hogan*
" v. *Kurtz*, 94 U. S. 773, 778. And by the Constitution
" of Ohio of 1851, none but white male citizens were
" entitled to vote, or to hold office."

Such was also the law of Texas. Sayles' Civil Code of Texas, Vol. 1, page 541, Chap. 4, Art. 1888—Title "Suf-
" rage;" and as cited in the former brief, illegal voting in Texas is punishable with fine and imprisonment.

In *Caddik* v. *Pavik* (83 Northwestern Reporter, p. 5, N. Dak.) it was ruled that proof of voting overcomes the presumption of alienage and raises the presumption of naturalization, as the law will not presume that the party committed an unlawful act. The rule is reaffirmed in *People ex rel. Smith et al.*, 27 New York 45.

III.

Johnson v. *The United States and Ute Indians* (160 U. S. 546), cited against us, is not a case in point. There the appellant admitted upon the record that he was *not* a citizen of the United States when the Indian depredation was committed. And the question raised and ruled was whether his subsequent admission to citizenship brought his claim within the act conferring jurisdiction upon the Court of Claims to adjudicate this class of cases. The

suggestion of counsel in connection with the citation of this case, that there are many similar cases found in the Court of Claims, wherein the argument based on domicile or continued residence would apply with equal force is, of course, wholly outside of this record. It cannot affect the legal conclusion here, but it can with propriety be suggested that the citation of *Johnson* v. *United States*, as illustrating the character of such cases, is not a happy illustration in respect to its application to the case at bar.

IV.

We do not concede the opposing contention that the presumption may be here indulged against the appellant because the United States is defendant. *Contra*, where by settled authority and innate principle, presumption leans in favor of the claimant for citizenship, in respect to his exercise of political rights, the same principle and the same presumption must have equal force where protection of his property is involved. In a court of justice, it has long been ruled that the United States stands upon the same footing as a private suitor; bound by the same rules of pleading, evidence, and practice. The principle is clearly expressed by Mr. Justice Field, in *United States* v. *Flint* (4th Sawyer, 42, 58), thus:

"The United States, by virtue of their sovereign char-
" acter, may claim exemption from legal proceeding; but
" when they enter the courts of the country as a litigant,
" they waive this exemption and stand on the same foot-
" ing with private individuals."

V.

In discussing provisions of the Fourteenth Amendment it has been said:

"The word citizen is employed in the law in different "senses under different circumstances. As generally "employed, however, it may be said to mean *a person* "*owing allegiance to the Government and entitled to pro-* "*tection* from it. Such, doubtless, is the meaning of the "word as here used. It therefore includes females as "well as males, *minors as well as adults*, those who do "not, as well as those who do, possess the privilege of "the elective franchise." Story, Constitution, LL. p. 654; see note by Cooley.

In reference to the effects of the annexation of foreign territory, where no excluding clauses intervene, it is said:

"*Persons* brought in by annexation of foreign territory "are not regarded as aliens, but as citizens. So it was "decided in the case of Mr. Yulee, chosen a member of "Congress from Florida; and this ruling has been acted "upon since as clearly and unquestionably correct." Story, *supra.*

The suggestion of opposing brief that appellant's "rov- "ing disposition" discloses the lack of intention to acquire domicile, is in no manner justified by this record. The findings show that appellant was born in February, 1831. He is now, therefore, nearly seventy years old. He remained in Texas from July, 1845, until he came to Arizona in 1855 on the Boundary Commission.

The finding is that since the admission of Texas "the "claimant has resided continuously in the United States, "mostly in Arizona and sometime in California. He "*visited* Germany with his wife and child from 1873 to "1880, his home and furniture remaining all the time in "this country. He was married in the United States." The fact remains that for some fifty-six years he has resided in the United States, with the brief absence noted in the visit to his fatherland. There is nothing in the

findings to otherwise justify the suggestion that he was or is a rover, and hence, by natural instinct, incapable of acquiring a domicile. Beyond all question he is shown to have been a *bona fide* resident of the United States for over fifty-five years. Coming as a lad to Texas, and remaining in the land of his adoption ever since, no violence is done judicial authority, nor the opinions of learned writers on the civic status by ruling him to be in law, what, since 1854, he has believed himself to be in fact—a citizen of the United States. Certainly upon this record Germany would not regard him as a citizen of that Empire, nor interpose for the protection of his personal or property rights.

Respectfully submitted.

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